

2000

Whitewater Whirlpool Baths & Systems, Inc. v. Barbara R. Summerhays, Ran Co Homes, Inc., and Does 1 through 25 : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

RanCo Homes, Inc.; Bruce C. Jenkins; Robert M. Jensen; Attorney for Defendant/Appellee, Summerhays.

Howard Chuntz; Attorney for Plaintiff/Appellant.

Recommended Citation

Brief of Appellee, *Whitewater Whirlpool Baths & Systems, Inc. v. Summerhays*, No. 20000592 (Utah Court of Appeals, 2000).
https://digitalcommons.law.byu.edu/byu_ca2/2830

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

FIFTH DISTRICT COURT, DIVISION II, STATE OF UTAH
COUNTY OF WASHINGTON, ST. GEORGE DEPARTMENT

SYSTEMS, INC.,

Plaintiff,

v.

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25.

Civil No. 990500591

Defendants.

IN THE UTAH COURT OF APPEALS

Case No. 20000592-CA

BRIEF OF APPELLEE

TO APPEAL FROM FIFTH DISTRICT COURT, WASHINGTON COUNTY

JUDGE JAMES L. SHUMATE

RanCo Homes, Inc.
P. O. Box 910472
St. George, UT 84790

Howard Chuntz, No. 4208
Attorney for Plaintiff/Appellant
1149 West Center Street
Orem, UT 84057

Bruce C. Jenkins
Robert M. Jensen
Attorney for Defendant/Appellee, Summerhays
352 East Riverside Drive, Suite C-4
St. George, UT 84790

Argument priority classification from Utah R. App. P.29(b)(15)

FIFTH DISTRICT COURT, DIVISION II, STATE OF UTAH
COUNTY OF WASHINGTON, ST. GEORGE DEPARTMENT

FILED
Utah Court of Appeals

JAN 19 2001

Paulette Stagg
Clerk of the Court

WHITEWATER WHIRLPOOL BATHS &
SYSTEMS, INC.,

Plaintiff,

v.

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25.

Civil No. 990500591

Defendants.

IN THE UTAH COURT OF APPEALS

Case No. 20000592-CA

CERTIFICATE OF SERVICE

TO APPEAL FROM FIFTH DISTRICT COURT, WASHINGTON COUNTY

JUDGE JAMES L. SHUMATE

RanCo Homes, Inc.
P. O. Box 910472
St. George, UT 84790

Howard Chuntz, No. 4208
Attorney for Plaintiff/Appellant
1149 West Center Street
Orem, UT 84057

Bruce C. Jenkins
Robert M. Jensen
Attorney for Defendant/Appellee, Summerhays
352 East Riverside Drive, Suite C-4
St. George, UT 84790

Argument priority classification from Utah R. App. P.29(b)(15)

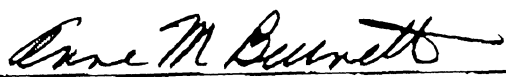
I hereby certify that on the 17th day of January, 2001, I served a copy of the BRIEF OF APPELLEE by Federal Express overnight mail addressed to the following:

Utah Court of Appeals
450 South State Street
Salt Lake City, Utah 84114

Howard Chuntz
1149 W. Center Street
Orem, UT 84057

and by U.S. Mail, first class postage prepaid, to.

RanCo, Inc.
P. O. Box 910472
St. George, UT 84791



Paralegal

FIFTH DISTRICT COURT, DIVISION II, STATE OF UTAH
COUNTY OF WASHINGTON, ST. GEORGE DEPARTMENT

WHITEWATER WHIRLPOOL BATHS &
SYSTEMS, INC.,

Plaintiff,

v.

BARBARA R. SUMMERHAYS, RAN CO
HOMES, INC., and DOES 1 through 25.

Civil No. 990500591

Defendants.

IN THE UTAH COURT OF APPEALS

Case No. 20000592-CA

BRIEF OF APPELLEE

TO APPEAL FROM FIFTH DISTRICT COURT, WASHINGTON COUNTY

JUDGE JAMES L. SHUMATE

RanCo Homes, Inc.
P. O. Box 910472
St. George, UT 84790

Howard Chuntz, No. 4208
Attorney for Plaintiff/Appellant
1149 West Center Street
Orem, UT 84057

Bruce C. Jenkins
Robert M. Jensen
Attorney for Defendant/Appellee, Summerhays
352 East Riverside Drive, Suite C-4
St. George, UT 84790

Argument priority classification from Utah R. App. P.29(b)(15)

TABLE OF CONTENTS

| | |
|--|----|
| TABLE OF AUTHORITIES | 3 |
| JURISDICTION | 4 |
| ISSUES FOR REVIEW AND STANDARD OF REVIEW | 4 |
| CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS | 4 |
| STATEMENT OF CASE | 4 |
| STATEMENT OF FACTS | 5 |
| SUMMARY OF ARGUMENT | 9 |
| ARGUMENT | 9 |
| I. THE TRIAL COURT WAS JUSTIFIED IN REFUSING TO SET ASIDE THE DISMISSAL WITH PREJUDICE GIVEN THAT PLAINTIFF’S MOTION WAS WITHOUT BASIS IN LAW. | 9 |
| II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AS THE EVIDENCE PRESENTED YIELDS TO DEFENDANT’S POSITION AT LEAST AS READILY AS TO PLAINTIFF’S POSITION. | 11 |
| A. The Trial Court Did Not Abuse its Discretion as Plaintiff Did Not and Cannot Establish a Prima Facie Case for Mutual Mistake. | 15 |
| B. The Trial Court Has Discretion to Deny the Setting Aside of the Dismissal with Prejudice until the Court Finds “Such Terms as Are Just” and the Court Is Convinced That Setting Aside Would Be “In Furtherance of Justice.” | 16 |
| CONCLUSION | 17 |

TABLE OF AUTHORITIES

| | |
|--|---------------|
| Utah Code Annotated § 78-2a-3(2)(i) | 4 |
| Utah Code of Judicial Administration, Rule 4-501(1)(a) | 10 |
| Utah Rules of Civil Procedure, Rule 60 | 4, 11, 12, 17 |
| <i>Black's Title, Inc. v. State Ins. Dept.</i> , 991 P.2d 607 (Utah App. 1999) | 12 |
| <i>Ellis v. Swensen</i> , 2000 UT 101, ¶30 | 11 |
| <i>Franklin Covey Client Sales, Inc. v. Melvin</i> , 2000 App 100, ¶¶ 8 and 9 | 4, 12 |
| <i>In re Discipline of Pendleton</i> , 2000 UT 77 ¶ 38 | 12 |
| <i>Katz v. Pierce</i> , 732 P.2d 92, 93 (Utah 1986) | 12 |
| <i>Monson v. Carver</i> , 928 P.2d 1017, 1022 (Utah 1996) | 11 |
| <i>Promax Dev. Corp. v. Mattson</i> , 943 P.2d 247, 255 (Utah Ct. App. 1987), cert. denied, 953 P.2d 449 (Utah 1997) | 12 |
| <i>State v. Lopez</i> , 886 P.2d 1105, 1113 (Utah 1994) | 11 |
| <i>State v. Mabe</i> , 864 P.2d 890, 893 n.6 (Utah 1993) | 11 |

JURISDICTION

The Court of Appeals has jurisdiction in this matter pursuant to 78-2a-3(2)(i) of the Utah Code Annotated.

ISSUES FOR REVIEW AND STANDARD OF REVIEW

A. Whether the trial court acted within its discretion in denying Plaintiff's Motion to Set Aside Stipulation for Dismissal, when Plaintiff had identified no legal basis for doing so. (Standard of appellate review: Correction of error.)

B. Whether the trial court acted within its discretion in denying Plaintiff's Motion to Set Aside Stipulation for Dismissal, when a trier of fact could have reasonably found from the evidence presented that the parties had reached a binding agreement to dismiss the matter with prejudice. (Standard of appellate review: abuse of discretion. *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 App 100, ¶¶ 8 and 9.)

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

The pleadings which plaintiff submitted to the trial court are void of any reference to any constitutional provision, statute, ordinance, rule or regulation, or reference to any legal basis whatsoever. Now on appeal, for the first time, Plaintiff references and analyzes Rule 60(b)(1), (3) and (6), although Rule 60(b)(6)¹, and general contract principles.

STATEMENT OF CASE

The parties negotiated a settlement involving the Tamarack matter, and this present matter

¹Although Rule 60(b)(6) is cited by Plaintiff it is never addressed.

referred to as the Summerhays matter. As a part of the parties' settlement, they dismissed the present cause of action with prejudice. A dispute has arisen regarding whether the trust deed given by Defendant RanCo Homes, Inc. to Plaintiff Whitewater Whirlpool Baths & Systems, Inc. was required to be a first position trust deed. Both parties have presented evidence in their favor. Whitewater argues that the May 11, 1999 letter from RanCo's counsel states that the Summerhays trust deed would be a first position trust deed. Whitewater further argues that the July 26, 1999 letter makes no express mention of an alteration of the position of the Summerhays trust deed. RanCo argues that his counsel was not involved in the initial negotiations, that the May 11, 1999 reference to a first position trust deed on the Summerhays matter was inadvertent and contrary to the parties' agreement. RanCo argues, that Whitewater agents were aware that the property was already encumbered with a first and second position trust deed, and that they had all discussed and agreed upon a third position trust deed. Finally, RanCo also argues that Whitewater rejected the offer in the May 11, 1999 letter and that the subsequent July 26, 1999 letter more adequately reflects the parties' agreement, which was in fact performed. It is reasonable and proper that the Trial Court accepted RanCo's position and refused to set aside the stipulated Dismissal with Prejudice.

STATEMENT OF FACTS

1. On or about December 31, 1998 Plaintiff filed a Mechanic's Lien against the residential property of Defendant Barbara R. Summerhays. R 3 (Plaintiff's Complaint, ¶ 15).
2. On or About March 31, 1999, Plaintiff filed a Complaint against Defendant Barbara R. Summerhays, the property owner, and Defendant RanCo Homes, Inc., the contractor. R 1-5 (Plaintiff's Complaint).

3. Defendant, by and through its president, Richard A. Nelson, and Plaintiff, by and through Bryce Whitney and Ann Tucker, Plaintiff's manager and collection officer, respectively, conducted settlement negotiations and initially established the terms for settlement of this case (hereafter "Summerhays matter") and for the settlement of additional claims unrelated to this case and unrelated to the property which is the subject of this dispute (hereafter "Tamarack matter"). The parties agreed to dismiss Plaintiff's Summerhays Complaint with prejudice in exchange for Plaintiff receiving from Defendant RanCo, Inc., certain trust deeds and trust deed notes in connection with the Tamarack matter and certain trust deeds and trust deed notes in connection with the Summerhays matter. R 29-30 and 32 (Affidavit of Richard A. Nelson ¶¶ 2-6 and 8). *See also* Brief of Appellant, p. 2, ¶ c.

4. The parties' settlement, which involved both the Tamarack matter and the Summerhays matter, was intended to be a global and complete resolution, the whole being contingent upon each and every part of the agreement. R 31 (Affidavit/Richard A. Nelson, ¶¶ 10-11). Plaintiff does not contest that the resolution of the matter was in connection with a global settlement, wherein all terms were dependent on the others. *See* Record generally.

5. The trust deed in connection with the Tamarack matter was to be first position trust deeds. R 30-31 (Affidavit of Richard A. Nelson, ¶¶ 4, 5 and 8). The trust deed in connection with the present Summerhays matter was not required to be first position trust deeds. *Id.* *But See* Brief of Appellant, pp. 5 and 6.

6. In the course of settlement, Defendant RanCo had shown Plaintiff's agents and/or representatives his master escrow file, which indicated, in connection with the property relating to the present matter, unlike the property in the other claims, the presence of a first and second

position trust deeds, leaving the potential, at best, for a third position trust Deed. R 30 and 32 (Affidavit of Richard A. Nelson, ¶¶ 5 and 16). Plaintiff has not heretofore denied this fact. *See* Record generally. This fact is not disputed in any of the affidavits filed by Plaintiff. R 49-52.

7. On or about May 11, 1999, Defendant's counsel, who had not been involved in the negotiation, then drafted a letter to Plaintiff's counsel paraphrasing the terms of the global settlement. R 43-44 (Memorandum in Opposition to Plaintiff's Motion to Set Aside Dismissal with Prejudice and Request for hearing, Exhibit A). Defendant's Counsel, in the May 11, 1999 letter, properly paraphrased the parties' agreement with respect to the Tamarack matter and the issuance of a first position trust deed. R 30-31 (Affidavit of Richard A. Nelson, ¶ 7). However, Defendant's counsel, mistakenly and inadvertently assumed that the trust deed which was to be issued in connection with the present matter, would also be a first position trust deed. R 30-32 (Affidavit of Richard A. Nelson, paras. 7 and 16).

8. Plaintiff subsequently rejected the offer set forth in the May 11, 1999 letter. R 31 (Affidavit of Richard A. Nelson ¶ 10). Plaintiff has not denied this fact. *See* Record generally.

9. On or about July 26, 1999, Defendant's Counsel sent a second letter to Plaintiff's counsel. This July 26, 1999 letter more accurately represented the parties' agreement as it did not require the trust deed in relation to the Summerhays matter to be a first position trust deed. R 45 and 46 (Memorandum in Opposition to Plaintiff's Motion to Set Aside Dismissal with Prejudice, Exhibit B).

10. On or about September 14, 1999 a Stipulation for Dismissal, signed by Counsel for each party, was filed with the Court. R 19-20.

11. On or about September 15, 1999 the Court executed a Dismissal with Prejudice,

which was likewise signed and approved by all counsel. R 21-22.

12. Subsequent to the Dismissal With Prejudice, a Notice of Foreclosure was served upon Plaintiff showing priority over the third position trust deed which was given to Plaintiff in connection with the settlement of the Summerhays matter. R 26 (Affidavit of Howard Chuntz, ¶ 4).

13. Plaintiff then filed a motion to set aside Dismissal with Prejudice and reinstate Plaintiff's claim against Defendants, claiming that there was an additional term requiring first position trust deeds on both the Tamarack matter as well as the Summerhays matter. R 27-28 (Brief of Appellant, p.3, ¶ d). Plaintiff's Motion to Set Aside cites absolutely no legal basis and is not accompanied by a legal memorandum. R 27-28. The Motion was supported by only the Affidavit of Howard Chuntz, which was filed in conjunction therewith. R 25-26.

14. On or about November 22, 1999, Defendant RanCo Homes, Inc. filed a Memorandum in Opposition to Plaintiff's Motion to Set Aside Dismissal With Prejudice and Request for Hearing. R 34-46. Defendant's objection addresses the inadequacy of Plaintiff's initial Motion, the failure to file a memorandum, and the lack of legal basis contained therein. Defendant RanCo Homes, Inc. further address the fact that the parties' settlement had been a global settlement, only a minor portion of which related to the claim and damages of the present Summerhays matter, and that if the Trial Court set aside the Dismissal with Prejudice, the Trial Court should also set aside the entire settlement agreement. *Id.*

15. On or about December 20, 1999, Plaintiff filed the Reply to Richard A. Nelson's Memorandum in Opposition to Plaintiff's Motion, along with the Affidavit of Bryce Whitney and the Affidavit of Ann Tucker. R 47-54. Once again, Plaintiff failed to identify or even refer to any

legal basis. *Id.*

16. This matter came before the Trial Court on May 17, 2000, at 1:29 p.m. Plaintiff had requested that the matter be conducted via a telephonic hearing and there was, therefore, no stenographic, audio or visual record of the proceedings R 98-100 (Order Denying Motion to Set Aside).

17. According to the Trial Court's June 5, 2000 Order Denying Motion to Set Aside, the Trial Court had "thoroughly reviewed the related pleadings and affidavits in the file, [] heard the arguments of all parties through their counsel" and found "good cause appearing" to deny Plaintiff's Motion to Set Aside Dismissal With Prejudice. R 99 (Order Denying Motion to Set Aside, p. 2).

18. Whatever the terms of the parties' agreement were, the trust deeds actually given to Plaintiff adequately secure Plaintiff's position. R 9 (Affidavit of Richard A. Nelson, ¶ 9). This fact is heretofore uncontested by Plaintiff. See Record generally.

SUMMARY OF ARGUMENT

Plaintiff is not entitled to have the stipulated Dismissal with Prejudice set aside. First, because Plaintiff provides the Trial Court with no legal basis for doing so. Additionally, Plaintiff should be precluded from now raising legal arguments for the first time on appeal.

Second, the trial Court, having reviewed the facts and arguments of the parties, concluded that the stipulated Dismissal with Prejudice should not be set aside. The Trial Court was well within its discretion as substantial facts support RanCo's arguments and the Trial Court's decision. The parties entered into an agreement which did not require a first position trust deed in connection with the Summerhays matter. Plaintiff's agents were aware that the property was

already encumbered with a first and second position trust deed. Because these facts present a reasonable alternative to those presented by Plaintiff, it cannot be said that the Trial Court committed a clear abuse of discretion. On the contrary, based upon the evidence presented, the Trial Court was well within its discretion to refuse Plaintiff's motion to set aside.

ARGUMENT

I. THE TRIAL COURT WAS JUSTIFIED IN REFUSING TO SET ASIDE THE DISMISSAL WITH PREJUDICE GIVEN THAT PLAINTIFF'S MOTION WAS WITHOUT BASIS IN LAW.

Plaintiff argues that the trial court failed to apply certain legal principles to the present dispute. Plaintiff claims that the standard of appellate review as to this issue is a correction of error standard. Brief of Appellant, p. 1.

Plaintiff's initial motion to set aside is without a stated legal basis, legal analysis, and is completely without even a reference to law. R 27-28. Moreover, Plaintiff's initial, two-sentence Motion is "unaccompanied by a memorandum of points and authorities" as required by the "Code of Judicial Administration, Rule 4-501(1)(a)." R 27-38 (Memorandum in Opposition to Plaintiff's Motion to Set Aside Dismissal With Prejudice and Request for Hearing, pp 5-6). Even Plaintiff's reply brief and the accompanying affidavits were void of any legal reference. R 47-54. This single point establishes a sufficient basis for the Trial Court's denial of Plaintiff's Motion to Set Aside the Dismissal with Prejudice. As Plaintiff's Trial Court pleadings present no legal basis compelling any specific decision from the trial court, and as Plaintiff's Trial Court pleadings present no legal basis for the Court of Appeals to review for correctness, Plaintiff has no basis for claiming that any error was made or that any error should be corrected. *See generally* R 27-28, 47-49 (Motion to Set Aside Dismissal with Prejudice and Reinstate Plaintiff's Claim Against

Defendants and Reply to Richard A. Nelson's Memorandum in Opposition to Plaintiff's Motion).

Contrary to Rule 24(a)(3)(B) of the Utah Rules of Appellate Procedure, Plaintiff, for the first time, on appeal, now identifies a potential legal basis but fails to exhibit grounds for seeking review of an issue not preserved in the Trial Court. *See* Brief of Appellant, p. 1. Plaintiff is precluded from asserting arguments on appeal which were not adequately briefed and preserved below. "An appellate court generally will not review any issue that was not raised in the court below." *Ellis v. Swensen*, 2000 UT 101, ¶30. *See also State v. Mabe*, 864 P.2d 890, 893 n.6 (Utah 1993) ("Absent exceptional circumstances, this court will not consider issues *raised* for the *first time on appeal*"); *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996) ("[I]ssues not *raised* at trial cannot be argued for the *first time on appeal*." This rule applies to all claims, including constitutional questions, unless the petitioner demonstrates that 'plain error' occurred or 'exceptional circumstances' exist." (quoting *State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994))) "This rule is based, in part, on the principle that it is unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *Ellis v. Swensen*, 2000 UT 101, ¶30.

It would, therefore, be improper to reverse the Trial Court's decision, when Plaintiff failed to make a proper effort in arguing the present matter. Accordingly the trial court's Order Denying Motion to Set Aside should be affirmed.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AS THE EVIDENCE PRESENTED YIELDS TO DEFENDANT'S POSITION AT LEAST AS READILY AS TO PLAINTIFF'S POSITION.

A Rule 60(b) motion is reviewed by this Court on a clear abuse of discretion basis.

A denial of a motion to vacate a judgment under Rule 60(b) is ordinarily reversed

only for an *abuse of discretion*. "A trial court has discretion in determining whether a movant has shown [Rule 60(b) grounds], and this Court will reverse the trial court's ruling only when there has been an *abuse of discretion*." Ostler v. Buhler, 957 P.2d 205, 206 (Utah 1998) (citation omitted).

Franklin Covey Client Sales, Inc. v. Melvin, 2000 App 110, ¶¶ 8 and 9 (Emphasis and additions in the original). The Court of Appeals has held that the discretion of the finder of fact is respected unless its decision is clearly erroneous.

the commissioner has "considerable *discretion* under Rule 60(b) in granting or denying a motion to set aside a [default] judgment" and for this court to interfere, "*abuse of that discretion* must be clearly shown." (Citations omitted). That is, although "some basis may exist to set aside the default[, we will not conclude the Commissioner] abused [his] discretion in refusing to do so when facts and circumstances support the refusal." (Citations omitted). Further, we will not upset the Commissioner's factual findings when challenged as unsupported by sufficient evidence unless clearly erroneous.

Black's Title, Inc. v. State Ins. Dept., 991 P.2d 607 (Utah App. 1999) (quoting *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986) and *Promax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah Ct. App. 1987), cert. denied, 953 P.2d 449 (Utah 1997)). See also *In re Discipline of Pendleton*, 2000 UT 77 ¶ 38.

Pursuant to the above cited law, Plaintiff has not "clearly shown" an "abuse of discretion." The Trial Court's Order Denying Motion to Set Aside is not "clearly erroneous" as it can be reasonably said that the "facts and circumstances support the refusal."

For the first time on appeal, Plaintiff argues that there was a "mistake" under Rule 60(b)(1), or that there has been misrepresentation of fraud under Rule 60(b)(3). Plaintiff marshals selective evidence with an attempt to supports its position that there was a "mistake in understanding of the terms of the agreement. . . . On that basis alone, the Court should have granted Plaintiff's Motion to set aside the Order." Brief of Appellant, pp 6-7. However, when all

the evidence is marshaled, there is no basis for a claim of abuse of discretion. On the contrary, when all of the evidence is marshaled, it reveals a conflict or divergence in the parties' positions, Defendant's position being at least as tenable as Plaintiff's.

Plaintiff first discusses its own interpretation of the May 11, 1999 letter and of the July 26, 1999 letter sent from Russell S. Mitchell, counsel for Defendant RanCo Homes, Inc. Plaintiff argues that the May 11, 1999 letter established an offer relating to both the Tamarack and Summerhays matters, and requiring a first position trust deed on the Summerhays matter. Brief of Appellant, pp 5-6. Admitting that there had been some negotiation between the two letters, Plaintiff continues by arguing that the July 26, 1999 letter actually

clarified changes in the agreement with respect to a settlement of a matter not dealing with the lawsuit involving the Summerhays [the Tamarack matter] and reiterating the agreement already reached between the parties with respect to the debt owing by RanCo to Plaintiff with respect to the Summerhays Complaint. Nothing in the July 26th letter makes any reference to an alteration in the agreement that RanCo would give plaintiff a first position trust deed note and trust deed with respect to the Summerhays debt and plaintiff had no reason to expect that any change was intended.

Brief of Appellant, pp. 5 and 6.

Plaintiff then very briefly, and incompletely, identifies Defendant's position as to only the May 11, 1999 letter, quoting from the Affidavit of Richard A. Neilson:

Through an oversight and miscommunication, Mr. Mitchell inadvertently stated in a letter that not only the Tamarack matter would involve a first position deed of trust, but he also erroneously stated that the Summerhays matter would be handled by a deed of trust in first position.

* * *

I cannot identify why there was a communication breakdown on whether the deed of trust on Lot 4 would be a first or second position deed of trust as between me and my attorney.

Brief of Appellant, p. 6 (quoting R 30 and 32).

After this cursory synopsis of the facts, Plaintiff concludes that

it is clear from these letters and the affidavit that a mistake in understanding of the terms of the agreement between the parties upon which the Stipulation to Dismiss had occurred. On this basis alone, the Court should have granted plaintiff's Motion to set aside the Order Dismissing its Comparing and not doing so was an abuse of discretion.

Brief of Appellant, p. 6.

Plaintiff's conclusion is premature as it fails to consider all the evidence. First, Plaintiff fails to recognize Defendant RanCo's argument that the parties had already reached an understanding and established a binding agreement, and that his attorney had "inadvertently" misparaphrased the same. R 30 and 32 (Affidavit of Richard Nelson, ¶¶ 7 and 16). With this single, additional allegation, a finder of fact is justified in enforcing the agreement and refusing to set aside the corresponding Dismissal With Prejudice.

Plaintiff also fails to marshal additional evidence, first that Plaintiff undisputably rejected the "inadvertent" offer contained in the May 11, 1999 letter and that the parties' actual agreement was contained in the July 26, 1999 letter. R 31 (Affidavit of Richard A. Nelson, ¶ 10).

Plaintiff also does not address the fact that the July 26, 1999 letter does not require the trust deed to settle the Summerhays matter to be a first position trust Deed. R 45-46. Plaintiff does not address the undisputed fact that its agents, Mr. Witney and Ms. Tucker, had each reviewed the escrow file of Defendant RanCo, and knew that a first and second trust deed were already in place. R 30 (Affidavit of Richard A. Nelson, ¶ 5).

When all the evidence is marshaled, it does not suggest that the Trial Court abused its discretion. The facts presented by Defendant RanCo are at least as compelling as those facts

presented by Plaintiff.

At the end of Plaintiff's Point A, Plaintiff presents the following thesis: " If RanCo's president and its attorney knew, at the time of submitting the Stipulation to Plaintiff for signature, that it was giving a second position trust deed when a first position trust deed had been promised, then that would certainly constitute misrepresentation, if not fraud, upon Plaintiff." Nowhere in the record of this case does Plaintiff even allege that Defendants intentionally or fraudulently misrepresented to Plaintiff that Defendant RanCo would provide a first position trust deed while it intended to actually executed a third position trust deed. *See* Record generally. Moreover, the Brief of Appellant, fails to marshal evidence which would support a clear and convincing case for fraud or intentional mistake, yet alone evidence sufficient to clearly establish the Trial Court's abuse of discretion in concluding otherwise.

Plaintiff has failed to martial the evidence, to show mistake, fraud, or misrepresentation. Plaintiff has failed to show that the evidence stands clearly against Defendants such that a finding for Defendants would be a clear abuse of the Court's Discretion. Therefore, the trial Court's June 5, 2000 Order Denying Motion to Set Aside should be affirmed.

A. The Trial Court Did Not Abuse its Discretion as Plaintiff Did Not and Cannot Establish a Prima Facie Case for Mutual Mistake.

Plaintiff next argues that the Trial Court failed to apply contract principles. Brief of Appellant, pp 7-9.² Plaintiff briefly discussed the requirement of meeting of the minds and the law of mutual mistake. Plaintiff then simply concludes that one of two alternatives is mandatory:

²Plaintiff's second argument, Point B, relies on the same facts as its first argument, Point A.

Again, either plaintiff, its attorney and RanCo's attorney all understood that RanCo was giving plaintiff a first position trust deed for the Summerhays debt and, therefore, all were mutually mistaken about the [sic] second position trust deed that was actually given, or plaintiff mistakenly believed it was receiving a first position trust deed for the Summerhays debt from RanCo, but RanCo knew of this mistake and kept silent about only giving plaintiff a second position trust deed.

Brief of Appellant, p 8. This conclusion is a summary of the law of mutual mistake; "(1) That the instrument as made failed to conform to what both parties intended; or (2) That the claiming party was mistaken as to its actual content and the other party, knowing of this mistake, kept silent."

Id.

Plaintiff's conclusion fails to address the issue at hand, the alternatives suggested by RanCo, which lie beyond the scope of the law of mutual mistake: that the parties in fact had an agreement and an understanding, or that Plaintiff may have been mistaken, but RanCo did not know of the mistake and actually took steps to assure that no mistake had been made. When all evidence, including that represented by RanCo, is marshaled, alternatives beyond those suggested by Plaintiff become apparent and viable: The parties had an initial understanding that a third position trust deed would be issued, that Defendant showed Plaintiff the first and second trust deed on the encumbered property, that the parties agreed to a third position trust deed, that thereafter defendants' attorney inadvertently stated in the May 11, 1999 letter that the trust deed would be in first position, that the May 11, 1999 offer was rejected, that the July 26, 1999 letter was delivered three months later, removing the "inadvertently" stated term of delivering a first position trust deed in harmony with the fact that there was already a first and second position trust deed in place.

It is Plaintiff's burden to establish that the Trial Court committed an abuse of discretion, to

clearly establish that the facts are so strongly in favor of Plaintiff that the Trial Court should not have concluded other than in Plaintiff's favor. However, Plaintiff must marshal all evidence, including RanCo's evidence which supports the additional alternatives. Because this additional evidence was before the Trial Court, and because this evidence presents a reasonable and tenable alternative, the Trial Court cannot be said to have clearly abused its discretion. The Trial Court's Order Denying Motion to Set Aside should, therefore, be affirmed.

B. The Trial Court Has Discretion to Deny the Setting Aside of the Dismissal with Prejudice until the Court Finds "Such Terms as Are Just" and the Court Is Convinced That Setting Aside Would Be "In Furtherance of Justice."

Rule 60, of the Utah Rules of Civil Procedure, expressly preserves the Trial Court's discretion in the present situation, stating that relief may be granted "upon such terms as are just," and "the court may in the furtherance of justice relieve a party." Rule 60(b)(2000).

In the present matter, plaintiff did not present a compelling argument, neither a legal argument grounded in law, nor a factual argument grounded in evidence which presented terms justifying its Motion to set aside. Nor did the Trial Court feel that Plaintiff's Motion was in the furtherance of justice, compelling the Trial Court to set aside the Dismissal with Prejudice.

First, as previously averred by Defendant RanCo Homes, Inc., without objection in the Trial Court record, or in the Brief of Appellant, Plaintiff remains adequately secured and suffers no damage as a result of Plaintiff's purported "mistake in understanding." Second, the underlying global settlement was the settlement of several matters: the present matter involving claims of approximately \$8,000.00, which is the lynch pin to a related collateral matter between Defendant RanCo Homes, Inc. and Defendant Barbara B. Summerhays, and the Tamarack matter between

Plaintiff Whitewater Whirlpool Baths & Systems, Inc., and Defendant RanCo Homes, Inc. involving claims in excess of \$30,000.00. The present dispute constitutes less than 25% of the overall settlement principal. If the trial court were to find mutual mistake and set aside the settlement and the Dismissal with Prejudice, pursuant to Plaintiff's argument, then the entire global settlement should be set aside, as it is unrefuted that the global settlement was contingent upon each individual term. Such a setting aside would effect parties and claims in addition to and larger than the present matter. Third, Plaintiff may, if it is so included, file suit for fraud or mistake of the underlying settlement agreement in a separate matter.

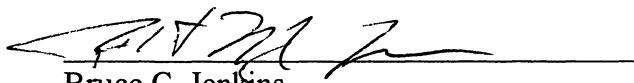
Each of these three arguments establish an additional basis for the Trial Court's denial of Plaintiff's motion, such not being upon just terms or in furtherance of Justice.

CONCLUSION

This Court should affirm the decision of the Trial Court. Plaintiff has failed to present a legal basis upon the Trial Court record. Plaintiff has failed to martial all evidence and establish that the facts yield only to Plaintiff's arguments, such that the Trial Court has clearly committed an abuse of Discretion. Therefore, this Court should refuse Plaintiff's request and affirm the Trial Court's Order Denying Motion to Set Aside.

DATED this 17th day of January, 2001.

Jenkins & Jensen LLP


Bruce C. Jenkins
Robert M. Jensen
Counsel for Barbara R. Summerhays
Defendant/Appellee